STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 27, 2007
v	No. 265368 Shiawassee Circuit Court
KENT REED CARR, JR., Defendant-Appellant.	LC No. 05-002181-FH

Before: Owens, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of larceny from the person, MCL 750.357. Defendant was sentenced, as a second-habitual offender, MCL 769.10, to 2 to 15 years' imprisonment for his conviction. We affirm.

I

Defendant's conviction stems from an incident on October 11, 2004, in which defendant allegedly forcibly took $30 from an acquaintance, Trevis Dallas, while Dallas was sitting in his truck outside a party store in Shiawassee County. Defendant allegedly demanded the money as compensation for his personal belongings that Dallas took when the two traveled to California together and defendant was arrested and jailed on a felony domestic violence charge.

II

Defendant first argues that he is entitled to 213 days credit for time served. We disagree. We review de novo issues of statutory interpretation. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997).

Defendant was arrested on January 6, 2005, for the current charge. On January 7, 2005, defendant posted bond and was released. However, at his preliminary examination on February

1, 2005, defendant was arrested on the basis of a California fugitive warrant.[1] On May 2, 2005, following a hearing on defendant's ex-parte motion for release, the court set aside the bond on the fugitive warrant, and remanded defendant without bond based on its own order because of California's pending extradition request. Defendant was subsequently convicted in this matter and sentenced on September 2, 2005.

The court granted defendant 52 days of credit for time served from the start of his trial, July 12, 2005, until sentencing, September 2, 2005. Defendant argues that the trial court should have granted him 213 days of jail credit for time served from February 1 to September 2, 2005, pursuant to MCL 769.11b.

MCL 769.11b provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

Citing *People v Johnson*, 205 Mich App 144; 517 NW2d 273 (1994), defendant essentially contends that he is entitled to credit for the time held in custody in regard to the California offense. Defendant relies on authority and reasoning that is no longer valid. In *People v Seiders*, 262 Mich App 702, 704, 706; 686 NW2d 821 (2004), this Court concluded that *Johnson* was wrongly decided and that MCL 769.11b does not "entitle a defendant to credit for time served before sentencing if he is incarcerated for an offense other than that for which he is ultimately convicted, or for unrelated reasons." Accordingly, a defendant, who is on parole from a foreign jurisdiction and is held on a parole detainer, is not entitled under MCL 769.11b to credit on his Michigan sentence for time served before sentencing. *Seiders, supra* at 705.

A defendant is only entitled to a sentencing credit under MCL 769.11b "because of being denied or unable to furnish bond for the offense of which he is convicted." MCL 769.11b; *Seiders, supra* at 707. Defendant's confinement from February 1 until July 12, 2005, was not the result of being denied or unable to furnish bond for the offense of which he was convicted. Rather, defendant was incarcerated because of his fugitive status. *People v Ovalle*, 222 Mich App 463, 468-469; 564 NW2d 147 (1997).

Defendant also erroneously relies on MCL 768.7a(2), which states that "[i]f a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was *on parole* from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense." (Emphasis added.) Because defendant was not on parole during this time, but, rather was a fugitive, MCL 768.7a(2) is inapplicable.

[1] Defendant was scheduled to appear in California on January 20, 2005, for sentencing on a domestic violence offense, but he failed to appear and a warrant was issued for his arrest.

III

Defendant next argues that the verdict is against the great weight of the evidence. We disagree. We review unpreserved great weight of the evidence claims for plain error affecting defendant's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

A new trial may be granted on some or all of the issues if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Musser, supra* at 218-219. The elements of larceny are: (1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with felonious intent, (4) the subject matter must be the goods or personal property of another, (5) and the taking must be without the consent of and against the will of the owner. *People v Ainsworth*, 197 Mich App 321, 324; 495 NW2d 177 (1992).

The testimony and other evidence presented supported the elements of the offense. Defendant nevertheless argues that three credible witnesses gave testimony that supported a contrary conclusion. Further, defendant was much bigger and stronger than Dallas and could have taken other items, such as compact discs and a player, had he wanted, but instead the evidence showed that defendant treated Dallas like a family member and was hurt that Dallas had stolen from him.

Although some witnesses testified that Dallas voluntarily gave defendant the money, "[i]t is the province of the jury to determine questions of fact and assess the credibility of witnesses." *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Id*. at 647. "The credibility of a witness is determined by more than words and includes tonal quality, volume, speech patterns, and demeanor, all giving clues to the factfinder regarding whether a witness is telling the truth." *Id*. at 646. The jury found defendant guilty of larceny from the person after seeing, hearing, and observing all the witnesses, including the witnesses that testified that Dallas voluntarily gave defendant the money. Defendant has failed to show that the verdict is against the great weight of the evidence and that a new trial should be granted.

IV

Defendant argues that he was denied his right to a fair trial because of the ineffective assistance of counsel. We disagree. This issue is unpreserved, and therefore our review is limited to the facts on the record. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002).

To establish a claim of ineffective assistance of counsel a defendant must show: (1) that his trial counsel's performance fell below an objective standard of reasonableness; and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Walker*, 265 Mich App 530, 545; 697 NW2d 159 (2005), vacated in part on other grounds 477 Mich 856 (2006). "Effective assistance of counsel is presumed, and the defendant

bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Thus, defendant must overcome a strong presumption that defense counsel's action constituted sound trial strategy. *Walker, supra* at 545.

Defendant argues that counsel was ineffective because counsel advised him not to testify, even though he did not have anything to lose if he testified and attempted to explain the incident at issue to the jury. We disagree. There is no record showing how counsel advised defendant on this issue, and thus we cannot conclude that counsel advised defendant inappropriately.

Even assuming counsel advised defendant not to testify, defendant has failed to show that he was so prejudiced by counsel's advice that he was denied a fair trial. *Id.* Defendant asserts that the issue in this case was whether he used force to take the money and that he would have testified that he did not use force and he did not threaten Dallas. Further, his testimony would have placed his actions in a positive context, i.e., of trying to help Dallas, and doing things "the right way" based on friendship and loyalty. However, this general evidence was presented to the jury through Dallas's testimony and that of defense witnesses. Defendant has not shown that but for the alleged error, the result of the proceeding would have been different.

Moreover, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Defendant concedes that his testimony may have placed him in a negative light to some extent. Accordingly, we cannot conclude that counsel's decision was not a matter of trial strategy.

Defendant further argues that counsel was ineffective because he called Erin Frentzel to testify for the defense, and she made a bad impression on the jury. For the same reasons discussed above with regard to defendant's testimony, we reject defendant's claim. Defendant has failed to show that counsel's decision to present Frentzel as a witness was not a matter of trial strategy. Defendant's theory of the case was that Dallas stole defendant's belongings and owed defendant money. Frentzel's testimony supported this theory. Although Frentzel's testimony may have been damaging to the defense because of her statements regarding defendant's physical abuse, this evidence was already admitted because Dallas testified that defendant "beat" Frentzel on the way home from the airport. "This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, even if that strategy backfired." *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001).

V

Finally, defendant asserts that offense variable nine (OV 9) was incorrectly scored at ten points. We disagree. We review the trial court's scoring of a sentencing variable for clear error. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003).

OV 9 takes into account the number of victims of a crime and may be scored at ten points if there were two to nine victims. MCL 777.39(1)(c). When scoring OV 9 the court must "[c]ount each person who was placed in danger of injury or loss of life as a victim." MCL 777.39(2)(a); *People v Melton*, 271 Mich App 590, 595; 722 NW2d 698 (2006). The trial court

assessed OV 9 at ten points because it concluded that there were two victims of defendant's actions, Dallas and Loveless. We agree.

In *People v Morson*, 471 Mich 248, 262-263; 685 NW2d 203 (2004), the Supreme Court found that the sentencing court properly scored OV 9 at ten points because there were two people placed in danger of injury or loss of life from the defendant's armed robbery: the person who was robbed, and a bystander who responded to the cry for help. This Court has also found that OV 9 was properly scored at ten points because a defendant placed three people in danger of injury or loss of life when he shot the victim through the windshield of her vehicle while the victim's fiancé and child were both next to her. *People v Kimble*, 252 Mich App 269, 274; 651 NW2d 798 (2002).

Although defendant did not use any weapons during his encounter with Dallas and did not directly threaten Loveless, Loveless maintained that he feared defendant. Loveless listened as defendant threatened Dallas with bodily harm and asked Mikan about "beating up" Dallas for him. Loveless also watched defendant choke Dallas and demand money and compact discs from him. Loveless testified that he was fearful of defendant because he did not know what was going to happen to him and defendant was much bigger than he. Defendant's conduct and threats placed Loveless in danger. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Because the evidence showed that Loveless was in danger, the trial court's scoring of OV 9 was proper.

Defendant also briefly argues that he is entitled to resentencing because the police report for his California conviction should not have been attached to his presentence report. Although defendant claims he is entitled to resentencing on this basis, defendant fails to support his claim with any supporting authority. "'An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority.'" *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004) (citation omitted). Defendant fails to provide any legal support for his claim. For the reasons stated, "[s]uch cursory treatment constitutes abandonment of the issue." *Id*. at 59.

Affirmed.

/s/ Donald S. Owens
/s/ Janet T. Neff
/s/ Helene N. White